No. 78-988

In the Supreme Court of the United States

OCTOBER TERM, 1978

I. MARCO L. LAURENTI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. Supp. App.[1]) is reported at 581 F. 2d 37.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1978. A petition for rehearing with a suggestion for rehearing *en banc* was denied on October 17, 1978. Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including December 16, 1978, and the petition was filed on December 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1]"Pet. Supp. App." refers to the supplemental appendix to the petition for certiorari.

QUESTION PRESENTED

Whether 19 U.S.C. 1604 requires dismissal of an indictment for customs violations because of pre-indictment delay.

STATUTES INVOLVED

19 U.S.C. 1603 provides:

> Whenever a seizure of merchandise for violation of the customs laws is made, or a violation of the customs laws is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report promptly such seizure or violation to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction.[2]

19 U.S.C. 1604 provides:

> It shall be the duty of every United States attorney immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided, unless, upon inquiry and examination, such United States attorney decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises.

[2]The word "promptly" was inserted by Pub. L. No. 95-410, Section 603, 92 Stat. 896.

STATEMENT

On July 15, 1976, a 71-count indictment was returned in the United States District Court for the Southern District of New York following a 16-month investigation of allegations of customs fraud. Count One charged petitioners[3] with conspiracy to import goods into the United States by means of false customs statements (18 U.S.C. 542) and the making of false statements (18 U.S.C. 1001) in violation of 18 U.S.C. 371. Counts 2 through 36 charged substantive violations of 18 U.S.C. 542, each count referring to a particular invoice or customs entry, and counts 37 through 71 charged parallel violations of 18 U.S.C. 1001.

The investigation commenced on March 24, 1975, when a former employee of Lindar Manufacturing Corporation, a New York company involved in importing cutlery products for resale in the United States, told customs agents that the company was engaged in fraudulent conduct. He furnished the agents documents which revealed that Lindar's principals, petitioners I. Marco L. Laurenti and E. Giorgio L. Laurenti, were reporting false purchase prices to Customs in connection with their business of importing scissors and other cutlery products

[3]Petitioner I. Marco L. Laurenti is a principal of Lindar Manufacturing Corporation. Petitioner E. Giorgio L. Laurenti, Marco's brother, is a former principal of Lindar. Petitioner Rockhill Cutlery, Ltd. is a wholly-owned subsidiary of Lindar, and petitioner Rockwell Co. is its nominal predecessor (Pet. 3 n.*).

purchased from foreign manufacturers. Customs agents thereafter obtained search warrants, which were executed at the Lindar offices on March 26, 1975. The United States Attorney's office became involved in the investigation at that time. The investigation was lengthy due to numerous discussions with petitioners, two stages of grand jury proceedings, extensive evaluation of petitioners' seized documents (many of which required translation), pre-indictment litigation caused by petitioners, and the gathering of additional evidence after the seizure. On June 28, 1976, however, the Customs Service formally referred the case to the United States Attorney for the Southern District of New York, requesting the initiation of prosecution. The indictment was returned on July 15, 1976.[4]

Petitioners moved to dismiss the indictment on October 12, 1976, claiming that preindictment delay had violated 19 U.S.C. 1604, which calls for the United States Attorney "immediately to inquire into the facts of cases reported to him by [collectors]" and "forthwith to cause the proper proceedings to be commenced and prosecuted, without delay." They further contended that their Fifth and Sixth Amendment rights were violated by the delay.

The district court concluded that 19 U.S.C. 1604 applies to criminal proceedings and "by implication" requires dismissal of an indictment charging violation of the customs laws, unless the indictment is secured "forthwith" and "without delay." It then found that the delay between the commencement of the investigation and the filing of the indictment in this case, while not unconstitutional, violated 19 U.S.C. 1604 (Pet. App. 1-11). The court did not find that the delay caused any

[4]The government also instituted a forfeiture proceeding for the cutlery pursuant to 19 U.S.C. 1952 on October 18, 1976. *United States* v. *Various Articles of Cutlery*, No. 76 Civ. 5172 (TP G) (S.D.N.Y.).

prejudice to petitioners. Indeed, it expressly stated that, but for the mandate it found in Section 1604, the investigation's progress "could not be criticized in any fashion" (Pet. App. 7).

The government appealed, and the court of appeals reversed. The court held that, even assuming Section 1604 applies to criminal cases and was violated, the violation would not warrant dismissal of the indictment because Section 1604 does not confer any rights upon criminal defendants. The court stated that Section 1604's "without delay" language was not intended to benefit criminal defendants but to protect the public fisc, since customs duties "constituted the principal source of federal revenues from 1789 until World War I" (Pet. Supp. App. A-7 n.12, A-10 to A-11). Aside from the legislative history, the court also stated that "[p]olicy considerations of high moment" (*id.* at A-12) compelled it to conclude that Section 1604 does not authorize dismissal of an indictment. The court observed (*ibid.*) that petitioners' construction of Section 1604 "could encourage investigation of customs cases with undue haste, a circumstance as disadvantageous to defendants as to the Government itself." Moreover, United States Attorneys, "beset as they are by the Speedy Trial Act's time constraints, would be required to place extraordinary priority on customs cases over all other criminal cases governed solely by Sixth and Fifth Amendment precepts" (ibid.).[5]

ARGUMENT

Petitioners have cited no appellate decision (and we know of none) holding or even suggesting that Section 1604 authorizes a remedy of dismissal for delays in

[5]The court of appeals also noted its agreement with the district court that the indictment could not be dismissed on grounds other than Section 1604 (Pet. Supp. App. A-5 & n.11). Petitioners do not challenge this ruling here.

instituting criminal prosecution in customs cases. The legal issue presented by petitioners, which we submit was properly decided by the court of appeals, is one of first impression and does not warrant consideration by this Court at the present time.

1. We note at the outset that consideration of the issue presented in the petition would be premature. The effect of the decision of the court of appeals reinstating the indictment is equivalent to an initial decision of a district court declining to dismiss an indictment. The case thus comes before this Court in an interlocutory posture. Petitioners may be acquitted, or, if convicted, their convictions may be reversed on other grounds; in such event, there may be no necessity to determine the issue they present. If they are convicted, and their convictions are upheld on appeal, they will have full opportunity to present the issue to this Court in a petition for review of the final judgment against them. There is accordingly no basis for granting interlocutory review at this time.

2. In any event, the decision of the court of appeals that Section 1604 does not require dismissal of the indictment in this case is correct. The court held that the expedition requirement in Section 1604, which was originally enacted at a time when customs duties were the major source of federal revenue, was a directive to prosecutors to give priority to customs cases which might result in recovery of fines, forfeitures, and duties. The court's interpretation finds support in the legislative history of the statute (Pet. Supp. App. A-7 n.12). Such a directive creates no private right to relief for its violation. See our brief in *United States* v. *Caceres*, No. 76-1309;[6] cf. *Cort* v. *Ash*, 422 U.S. 66 (1975) (implied right of action limited to intended beneficiaries of Act).

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[6]A copy of our brief in *Caceres* is being mailed to counsel for petitioners.

The court also properly recognized that petitioners' construction of the statute would be most unsound in its practical effect, disrupting the administration of the criminal justice system and disserving the interests of many potential defendants. If the statute means that prosecutors must institute customs prosecutions "forthwith" or not at all, it will bring about all the undesirable consequences identified by the Court in *United States* v. *Lovasco*, 431 U.S. 783, 791-796 (1977). Hurried decisions regarding the propriety of prosecution of suspected customs crimes impede adequate investigation of the circumstances of the alleged offense in many instances, would disrupt the rational allocation of limited prosecutorial resources, and might often lead to the bringing of prosecutions in cases where fuller investigations or consultations would lead to the conclusion that prosecution is unwarranted. In this very case, indeed, the district court found that the diligence with which the investigation was pursued "could not be criticized in any fashion" (Pet. App. 7). To construe Section 1604 to require greater—often unseemly—haste disserves both societal and individual interests.

Finally, Section 1604, by its own terms, was not intended to govern criminal prosecutions, inasmuch as it applies only to cases "for the * * * recovery of [a] fine, penalty or forfeiture * * *." Virtually identical language in 26 U.S.C. (1952 ed.) 3740 was held in *Sullivan* v. *United States*, 348 U.S. 170, 171-172 (1954), *not* to refer to criminal prosecutions, since one "recovers" in a civil action and "prosecutes and punishes" in a criminal proceeding.

3. Petitioners' principal contention is that their construction of Section 1604 is necessary to avoid rendering customs seizures unconstitutional. Petitioners rely (Pet. 12) upon a line of cases interpreting 19 U.S.C. 1602-1604 in the context of civil forfeiture proceedings. *Sarkisian* v.

United States, 472 F. 2d 468 (10th Cir.), cert. denied, 414 U.S. 976 (1973); *States Marine Lines, Inc.* v. *Shultz*, 498 F. 2d 1146, 1153-1155 (4th Cir. 1974); *United States* v. *One Motor Yacht Named Mercury*, 527 F. 2d 1112 (1st Cir. 1975); *United States* v. *One 1970 Ford Pickup*, 564 F. 2d 864, 866 (9th Cir. 1977). Those cases held that, unless strict time limits apply to the commencement of civil forfeiture proceedings, the customs-seizure scheme would (or might) violate the Due Process Clause of the Fifth Amendment.

When the government seizes property for the sole purpose of civil forfeiture, we agree that the owner is entitled to a prompt forfeiture hearing or at least some kind of hearing to determine the prima facie validity of the seizure. *Commissioner* v. *Shapiro*, 424 U.S. 614, 630 n.12 (1976). If the government delays unreasonably in commencing such a proceeding, the owner is entitled to interim return of the property, subject to defeasance in the event the government prevails in the forfeiture action. However, because such interim return is a complete constitutional remedy, dismissal of a civil forfeiture action is never an appropriate remedy for delay. *Castleberry* v. *Alcohol, Tobacco & Firearms Division*, 530 F. 2d 672 (5th Cir. 1976). The *Sarkisian* line of cases is distinguishable because those decisions did not consider whether interim return of the property provided a complete remedy. Had those courts done so, we believe that they would have concluded that dismissal of the civil forfeiture action is not an appropriate remedy.[7]

[7]In addition to the *Castleberry* remedy, the owner of seized property may obtain a prompt determination of the validity of the seizure by moving in district court under Rule 41(e) of the Federal Rules of Criminal Procedure for the "return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized." Such a motion may be made even when there are no criminal or civil proceedings pending. *In re Grand Jury Proceedings*, 450 F. 2d 199, 207-208 (3d Cir. 1971) (en banc), aff'd *sub nom. Gelbard* v. *United States*, 408 U.S. 41 (1972); *United States* v. *Premises Known As 608 Taylor Ave.*, 584 F. 2d 1297, 1305 (3d Cir. 1978).

Moreover, the owner of property seized by customs officials has an administrative remedy of remission and mitigation. 19 U.S.C. 1618. In view of the procedural remedies available under Rule 41(e) and *Castleberry*, it is unnecessary to consider whether these administrative remedies, standing alone, would satisfy due process.

However that may be, a criminal prosecution such as the present case is distinguishable from the civil forfeiture cases in a more fundamental way. A criminal prosecution is independent of the seizure of any property. For example, in the present case, even if the imported cutlery had not been seized, the government would still be entitled to convict petitioners of the offenses alleged. The indictment alleges violations of the general conspiracy statute, 18 U.S.C. 371, and the false statements statute, 18 U.S.C. 1001, as well as customs offenses in violation of 18 U.S.C. 542. The indictment does not seek forfeiture, and forfeiture is not one of the penalties that is provided upon conviction of the offenses charged. Conversely, the fact that the government is prosecuting petitioners does not prevent them from insisting on the interim return of their property or the prompt commencement of civil forfeiture actions.[8] There is, therefore, no necessary connection between the present prosecution and the fact that the government is holding the imported cutlery for civil forfeiture. Under no circumstances, then, could dismissal

[8]Contrary to petitioners' assertion (Pet. 18), it is not necessary that civil forfeiture proceedings be held in abeyance until completion of criminal proceedings. When both civil and criminal proceedings are brought at the same time, or the criminal case is brought first, a defendant may move for prompt civil proceedings in order to vindicate his property interests. That any testimony he gives in such proceedings would be useable in a subsequent criminal proceeding does not violate his privilege against self-incrimination. See *Baxter* v. *Palmigiano*, 425 U.S. 308, 316-320 (1976).

of the present prosecution be necessary to vindicate any constitutional rights petitioners may have in the prompt return of their property.[9]

4. Finally, the facts of this case demonstrate that there was no unreasonable delay and, indeed, that much of the delay was attributable to petitioners. Although the court of appeals did not decide whether the delay violated the statute (Pet. Supp. App. A-6 to A-7), its opinion chronicled the history of the case (*id.* at A-4 n.9), showing that no unreasonable delay occurred.[10] Moreover, the

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[9]Of course, petitioners are not entitled to interim return of any materials that were lawfully seized and are needed as evidence in the criminal prosecution. It has long been recognized that the government may seize, subject to the Fourth Amendment, even the property of an innocent bystander for use as evidence in a criminal proceeding. *Warden* v. *Hayden*, 387 U.S. 294 (1967); *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978). Once the government no longer needs the property as evidence, the government must return it to its owner. *Warden* v. *Hayden, supra*, 387 U.S. at 308. But so long as the procedural requirements of the Fourth Amendment are met, the Due Process Clause does not impose an independent requirement that the criminal proceedings by instituted "forthwith" so that the owner may promptly recover his property. *Gerstein* v. *Pugh*, 420 U.S. 103, 120-127 (1975) (majority and concurring opinions). The constitutional rights of the owner, *qua* owner, do not improve when he is also a defendant against whom the evidence will be used. His constitutional rights, *qua* accused, include the right to a speedy trial. But his property rights to a prompt return of the seized property are no greater than those generally available to nondefendants.

[10]On the facts of this case, moreover, petitioners may not complain that prompt attention was not paid to the possibility of returning the cutlery. In June 1975, three months after the seizure, petitioners unsuccessfully moved for return of the seized goods under Rule 41(e) (App. 430-515). The district court nevertheless ruled (App. 515) that upon petitioners' posting of security in the amount of the market value of the goods seized, the government must release all goods seized except for such quantities as might be useful as exhibits in a forthcoming trial. Petitioners did not post letters of credit (Pet. 4 n.**). In addition, at petitioners' request, they were given until 60 days after the conclusion of the criminal case to file petitions for mitigation or remission (App. 426-429). No such petitions have been filed to date. "App." refers to the joint appendix in the court of appeals.

same summary shows that part of the delay was due to conferences with the prosecutors requested by petitioners and to consideration of Rule 41(e) motions filed by petitioners (*ibid.*). "[C]laimants who stand by mutely while time passes, facilitating or condoning delay by their requests or other actions, will not later be heard to complain of prejudicial delay." *Ivers* v. *United States*, 581 F. 2d 1362, 1373 (9th Cir. 1978) (civil forfeiture action under 31 U.S.C. 1102); see also *Barker* v. *Wingo*, 407 U.S. 514, 530-531 (1972) (demand for speedy trial a factor in determining violation of Speedy Trial Clause).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1979

DOJ-1980-03